Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

and

ROBERT C. HILLIARD and BARRY J. NACE,

Petitioners,

vs.

MERRELL DOW PHARMACEUTICALS, INC.,

and

THE SUPREME COURT OF THE STATE OF TEXAS, consisting of CHIEF JUSTICE THOMAS PHILLIPS, and ASSOCIATE JUSTICES, GREG ABBOTT, JAMES BAKER, CRAIG ENOCH, RAUL GONZALEZ, DEBORAH HANKINSON, NATHAN HECHT, PRISCILLA OWENS, and ROSE SPECTOR,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The First, Fifth, and Fourteenth Amendments to the United States Constitution protect litigants and their counsel from state court retaliation in response to pleadings critical of that court's conduct. In the courtroom setting, the First Amendment stands for the proposition that judges cannot retaliate against attorneys who represent their clients zealously for that very zeal. The Constitution also protects litigants from those state courts that seek to apply established rules of law inconsistently in order to deny litigants their rights to due process and to punish litigants and their attorneys' for criticizing such courts. Petitioners ask this Court to enforce these constitutional protections.

Petitioners present three questions:

1. Does the United States Constitution protect Kelly Havner's right to file a brief containing language critical of the Texas Supreme Court[1] without suffering adverse consequences on the merits of her case because of that critical language?

2. Does the United States Constitution protect Kelly Havner's counsels' rights to criticize, within the limits of non-disruptive conduct, the Texas Supreme Court without fear

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[1] Since the events giving rise to this Petition, the Texas Supreme Court has changed in terms of its membership. Associate Justice Hankinson has replaced Associate Justice John Cornyn, whose name appears on both of the orders at issue here, Justice Hankinson took no part in the proceedings described herein.

QUESTIONS PRESENTED – Continued

of adverse consequences in the form of punitive and retaliatory measures against either said counsel or Kelly Havner?

3. Does the Constitution protect Kelly Havner's right to due process in the form of equal application of rules of law, regardless of her counsels' conduct?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Kelly Havner, by and through her parents, Ernest and Marilyn Havner ("Kelly"), and Robert C. Hilliard and Barry J. Nace (counsel for Kelly in the proceedings below), respectfully petition the Supreme Court to issue a Writ of Certiorari to review certain decisions of the Texas Supreme Court, which decisions that court issued on November 13, and December 11, 1997.

OPINIONS BELOW

Kelly attaches the Texas Supreme Court's original opinion, opinion on rehearing, opinion on show cause order, and opinion on motion for leave to file motion for second rehearing, as Appendix Exhibits A, C, N, and S, respectively.[2]

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[2] Kelly provides the documents in the Appendix in chronological order of filing or issuance. In some instances, an exhibit to one document already is part of the Appendix; in other instances, some exhibits were irrelevant to this Petition and their inclusion would constitute unnecessary materials and a burden to this Court. Accordingly, and in the interests of economy, Kelly has not included with every document all exhibits originally attached thereto. Also, as to Appendix Item A ("App. A"), the original opinion of the Texas Supreme Court, after the preparation of the Appendix, counsel for Kelly learned that West has published the decision in the SouthWestern Reporter (Second). The opinion that counsel attached, however, is a copy of the court's document. The correct citation for the published decision is *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). Counsel also has learned that the court released the show cause order at issue here to West for publication. The correct citation for that order is *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997).

JURISDICTION

Kelly invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. §§ 1257, 2101 & 2104.[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Kelly references the following constitutional provisions: United States Constitution, Amendments I, V, and XIV. Kelly also references 28 U.S.C. § 1257(3)(a).

STATEMENT OF THE CASE

Kelly and her counsel ask this Court to resolve the dilemma in which they find themselves as a result of having criticized certain actions by the Texas Supreme Court. At issue is whether the United States Constitution protects Kelly from judicial retaliation in response to language used by her counsel in arguments made on her

[3] This case raises a peculiar jurisdictional question, namely, when is a judgment "final" within § 1257 when pre- and post-rehearing proceedings deny litigants federal constitutional protections. Because the procedural posture of this case renders the question of jurisdiction somewhat complicated, Kelly refers the Court to her Statement of the Case, below. This section focuses, among other things, on the events giving rise to the Court's jurisdiction and, in particular, the calculation of a date at which time the Texas Supreme Court issued a "final" decision for purposes of activating the petition for a writ of certiorari clock.

behalf. The Texas Supreme Court's response to the language it found offensive resulted in its refusing to treat Kelly as it does other, more favored, litigants on the issue of whether to order a remand or reversal.

The Constitution entitles Kelly to equal application of the law of Texas, regardless of the language her counsel chooses to employ. The Constitution also entitles her counsel to employ critical but non-disruptive language with confidence that a state court cannot penalize counsel – whether directly or indirectly through counsel's client – simply for the use of such language in a brief. The Constitution further protects an attorney's individual right to criticize – without judicial retaliation – a court for a perceived unfair result.

A. Proceedings Before the Texas Supreme Court.

1. Kelly Lost a Jury Verdict Under Circumstances That Both She and Her Counsel Perceived as Unfair.

Kelly, who contends she was born without a hand as a result of her mother's ingestion of Bendectin during pregnancy, won a state court, multi-million dollar verdict against Merrell Dow Pharmaceuticals, Inc. ("Merrell") nearly six years ago. (Vol. I, App. A at 4.) The nature of the litigation is effectively identical to that before this Court previously. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[4] (Vol. I, App. A at 5-9.) Neither Merrell nor the Texas Supreme Court ever

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[4] Kelly provides parallel cites to the Supreme Court Reporter in her Table of Authorities.

have disputed that Kelly tried her case under Texas law as it existed at the time of trial. (*See, e.g.*, Vol. I, App. A at 3-4 and Vol. I, App. B at 78-88.)

On July 24, 1997, the Texas Supreme Court rewrote the law of Texas, applying a new standard of what constitutes expert scientific evidence to Kelly's case. (*Id.*) Rather than grant Kelly a new trial, however, the court rendered judgment against her, in naked disregard of the very rules of law in Texas which the court itself crafted. (*Id.*) The court did not overrule these laws, nor did it modify them; it simply ignored them. (*Id.*)

2. The Texas Supreme Court May Have Denied Kelly a Remand Because Her Attorneys Criticized the Court as Unfair.

Kelly's counsel thereafter filed a motion for rehearing (the "Motion for Rehearing") in which they castigated, on her behalf, the members of that court for the unfairness of the decision. (Vol. I, App. B.) In particular, counsel asked the court to remand, and not render, as the prevailing common law and procedural rules of practice in Texas, require. (*Id.* at 88-95.) Counsel further contended on Kelly's behalf that the court's decision violated both the Texas and United States Constitutions. (*Id.* at 75-76.) Merrell never contested Kelly's arguments to this effect.

Although the language Kelly's attorneys used in the Motion for Rehearing was, in fact, critical, it was in no way improper. (*See, e.g., id.*) No party – not even a single member of the Texas Supreme Court – ever has disputed that the Motion for Rehearing did not disrupt a single moment of court time. The Court itself acknowledged, in

fact, in a published statement by one of the Associate Justices, that Kelly's Motion for Rehearing neither disrupted court proceedings nor "bruised any feelings." "[T]he court's action had nothing to do with the judges' sensibilities. . . . " and "The motion was filed when most justices were on vacation or educational leave." (Vol. II, App. M, Ex. 3 at 288 [Justice Gonzalez speaking to *Texas Lawyer*, a newspaper].)[5]

On November 13, 1997, the court summarily overruled Kelly's motion for rehearing. (Vol. I, App. C at 113.) The court thus disregarded – without explanation – the critical issue Kelly raised in her motion for rehearing, namely, whether it denied Kelly justice – and therefore violated the Texas and United States Constitutions – when it chose to apply selectively, and in derogation of Kelly's rights here, the law of Texas requiring that when an appellate court overturns an existing standard of review, the losing party is entitled to a remand and not a reversal. (Vol. I, App. B at 88-92.)[6]

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[5] Associate Justice Gonzalez' comments may have violated Canon 3 of the Texas Code of Judicial Conduct, which bars a judge from commenting to the media on a pending matter. *See* Canon 3, § B.(10) ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.").

[6] Justice Spector – who later dissented from the court's decision to refer Messrs. Hilliard and Nace to the Grievance Committee of the State Bar of Texas (the "Grievance Committee") – herself concluded that the Motion for Rehearing was merely an "intemperate attack" on the court, which failed to address the legal issues pertinent to Kelly's case. (Vol. II,

The court addressed, instead, only the "tenor of the motion for rehearing," stating that the "tenor" required the court to consider whether Kelly's counsel were in contempt, and whether the court should sanction counsel, and/or refer counsel to the Grievance Committee. (Vol. I, App. C at 116.)

3. The Court Simultaneously Issued a Show Cause Order Based on Kelly's Counsels' Criticism of that Court.

When the court overruled the Motion for Rehearing, it declined to explain its decision to penalize her for her purported failure to satisfy a law not in effect at the time of her trial. The court chose, instead, to retaliate against Kelly and her counsel for the language contained by the Motion for Rehearing. Under the same cause number (in fact, in the same document denying Kelly's Motion for Rehearing), the Court ordered Kelly's counsel of record, namely Robert C. Hilliard, Barry J. Nace, and the undersigned counsel, Rebecca E. Hamilton, to show cause why the court should not punish them for the language in the Motion for Rehearing. (*Id.*)[7] In other words, the court left

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App. O.) Yet, all members of the court, including Justice Spector, ignored the weight of Kelly's Motion for Rehearing, which addressed specifically whether a court of appeals could selectively apply standards of review under the circumstances of the case. (Vol. I, App. B at 88-95.)

[7] Indeed, Kelly subsequently filed a motion to sever her case from that of her attorneys. The court overruled the motion to sever, declining either to assign the Show Cause Order proceedings to its administrative docket or to give them a separate cause number. (Vol. II, Apps. T and U.)

Kelly's proceedings open by issuing, in the same instrument as the denial of rehearing, a show cause order (the "Show Cause Order"), expressing in general terms why it viewed Kelly's counsels' conduct potentially contemptuous, sanctionable, and unethical.

4. The Texas Supreme Court Denied Kelly and Her Counsel Any Due Process in Connection With Its Show Cause Order.

The Texas Supreme Court was wholly unable to identify in the Show Cause Order *a single word* disruptive of the proceedings before it. The court instead identified only certain pages of the Motion for Rehearing, which contained, presumably, arguments whose "tenor" the court disdained. (Vol. I, App. C at 116.) In light of the lack of specificity of the Show Cause Order, Kelly and her counsel filed numerous motions seeking clarification, a hearing, a jury trial, and recusal – all of which motions the court ultimately denied.

a. The Texas Supreme Court Declined to Identify What Language in the Motion for Rehearing Disrupted Court Proceedings or Warranted Punishing Kelly and Her Attorneys.

Because the Court did not identify the language in the Motion for Rehearing about which it sought to find Kelly's counsel in contempt, Kelly's counsel needed

clarification from the court.[8] Counsels' only alternative was to guess about how they could have disrupted court administration by the mere filing of written words – for the parties never argued the Motion for Rehearing. Kelly's counsel thus moved the Court for clarification so that they could learn what items on the identified pages disrupted and/or were objectionable to the court. (Vol. I, App. D at 120-22, Vol. I, App. I at 160-61, and Vol. II, App. M at 252-56 [invoking the protections of the First, Fifth, and Fourteenth Amendments of the U.S. Constitution on behalf of both Kelly and her counsel].) The court overruled these motions. (*See* Vol. I, App. F and Vol. II, App. N.)[9]

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[8] *See, e.g.*, The Show Cause Order (Vol. I, App. C at 116.), which cites pages 8, 14, and 16 of the Motion for Rehearing (Vol. I, App. B at 79 & 89-91.) as examples of objectionable language. A cursory review of the Motion for Rehearing (Vol. I, App. B.) at these pages, however, reveals absolutely nothing disruptive to the judicial process. Indeed, pages 14 and 16 are primarily case citations. At most, those pages reflect the kind of rhetoric appellate practitioners employ every day, throughout all courts of this country.

[9] The court may have declined to clarify for the reasons discussed in Kelly's and her counsels' response to the Show Cause Order. (Vol. II, App. M at 220-49.) The Response demonstrated 113 separate examples of language by members of the Texas Supreme Court (contained in published opinions) accusing one and other in terms of an equal – and often far worse – "tenor." In particular, the Response itemized numerous excerpts from the court's published opinions in which members accused other members of bias and result orientation, of failure to follow case law, and of allowing cases to languish on appeal. The Response further itemized examples of negative metaphor employed by members of the court about each other (again, in published opinions) similar to that in the Motion for Rehearing.

b. The Texas Supreme Court Declined to Allow Any Discovery or Hearing.

Upon denial of the clarification motion(s), Kelly's counsel nevertheless prepared the Response to the Show Cause Order, attempting to anticipate the court's concerns. Kelly's counsel assumed that the court's offense arose from either language it found generically disrespectful or language suggesting bias. The First Amendment protects both forms of written language. *See, e.g., In re Little,* 404 U.S. 553, 555 (1972), and *Craig v. Harney,* 331 U.S. 367, 376 (1947). When at issue is language in a pleading that a court finds "disrespectful," the First Amendment affords counsel the opportunity to prove that the language did not disrupt judicial proceedings. When language critical of a court on the grounds of bias is the subject of contempt proceedings, the First Amendment entitles counsel the opportunity to prove truth. Accordingly, the First, Fifth, and Fourteenth Amendments afford due process in the form of, among other things, a right to a hearing.

Kelly's counsel thus asked for a hearing to prove that the language in the Motion for Rehearing, in fact, disrupted no part of court administration (as Justice Gonzalez already had told the media) and merely reflected constitutionally protected criticism of the court, albeit in strident (and often mixed) metaphor. Kelly's counsel also sought a hearing to prove the truth of any language as to bias. (Vol. I, App. E at 127-28, Vol. I, App. I at 159-61, and Vol. II, App. M at 258-59 [invoking the protections of the First, Fifth, and Fourteenth Amendments of the U.S. Constitution on behalf of both Kelly

and her counsel].)[10] Finally, Kelly's counsel asked for a jury trial on the issue of truth, as is their right under Texas and U.S. constitutional law. (Vol. I, App. H at 149-53 [invoking the protections of Texas law and U.S. Constitution].)[11] The court overruled these motions, too. (Vol. I, App. F and Vol. II, App. N.)

c. The Texas Supreme Court Declined to Recuse Itself.

In light of the factual issues raised as to disruption of proceedings and truth of bias allegations, Kelly's counsel asked for the Court to recuse itself in its entirety. (Vol. II, App. M at 261-62.) Recusal under the circumstances here is mandated by the Constitution. *See Muniz v. Hoffman*, 422 U.S. 454, 475-76 (1975), *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The court overruled this motion, too. (Vol. II, App. N.)

d. The Texas Supreme Court Declined to Distinguish Punishing Kelly from Punishing Kelly's Counsel.

Separately from the motions, Kelly's counsel filed individual and joint responses to the Show Cause Order, pleading with the Court not to prejudice Kelly for her counsels' conduct and, further, that counsels' conduct was not contemptuous, sanctionable, nor grievable, in any event. (*See* Vol. II, App. M *passim*.) Kelly's counsel

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[10] *See, e.g., Holt v. Virginia*, 381 U.S. 131, 136 (1965) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

[11] *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991).

contended that the Court was violating their First Amendment rights, as well as Kelly's. (*See generally* Vols. I & II, Apps. D-M.) Kelly's counsel specifically urged the court regarding Kelly, "To the extent that she has been punished for [her] counsels' conduct, [her] counsel urge the court to again rehear the legal issues and punish [her] counsel only." (Vol. II, App. M at 254.) The Court declined, however, either to address this issue or clarify the basis for its decision to reverse and render, rather than reverse and remand. (Vol. II, App. N.) Thus, again, the court intertwined Kelly's right to zealous representation with her right to due process on appeal.

B. This Court Has Jurisdiction.

State court proceedings about which a party seeks review by this Court must have culminated in a "final" order. 28 U.S.C. § 1257(3)(a). This requirement is jurisdictional. *Id.* At issue here, then, is when the Texas Supreme Court entered a final order as to all substantive matters pertaining to Kelly's case. *See, e.g., Pennsylvania v. Ritchie,* 480 U.S. 39, 47 (1987) ("Normally the finality doctrine contained in § 1257(3) is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved."), and *Flynt v. Ohio,* 451 U.S. 619, 620 (1981) (*per curiam*) ("In general, the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the

State.' " (ellipsis in original) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945))).

1. The Court's Ruling Denying Rehearing on November 13, 1997 Was Not a "Final" Ruling.

The November 13th denial of rehearing did not resolve Kelly's case. Rather, the Texas Supreme Court's Show Cause Order carried forward Kelly's case and, more importantly, directly affected her right to zealous representation by the counsel of her choice. At issue substantively was whether the court denied Kelly's Motion for Rehearing because of the language her counsel had employed therein. Further, had the court determined to bar Mr. Nace from further practice in Texas, Kelly would have had lost one of her three counsel when she needed him most. Finally, by sanctioning all of her counsel, the court could have rendered Kelly effectively bereft of any representation in Texas at this critical juncture in her case. In short, the November 13th denial of rehearing left open substantive issues about Kelly's case on the merits and, therefore, was not a "final" ruling. *See Minnick v. California Dep't of Corrections*, 452 U.S. 105, 122-23 (1981) ("The answer to the question whether the further proceedings in the state trial court 'have little substance' or are 'wholly unrelated to the federal question' is affected not only by the specifics of the particular litigation but also by the extent to which the 'policy of strict necessity in disposing of constitutional issues.' " (quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947))).

2. The Court's Ruling on December 11, 1997, Referring Messrs. Hilliard and Nace to the Grievance Committee, Was a "Final" Ruling.[12]

The court ultimately declined to enter any sanctions or findings of contempt as to any of the three counsel. It further declined to enter *any* findings against Ms. Hamilton, absolving her of any suggestion of misconduct. This decision was somewhat peculiar, given that Ms. Hamilton, the undersigned attorney here, admitted by affidavit to the Texas Supreme Court that she had drafted large parts of the Motion for Rehearing and consciously chosen to participate in its filing, knowing full well the nature – and probable effect – of the criticism it contained. (Vol. I, App. K.) Mr. Nace, on the other hand, attested by affidavit that he contributed *not one word* to the Motion for Rehearing and, in fact, never saw it prior to its filing. (Vol. I, App. G.) Mr. Hilliard and Ms. Hamilton supported Mr. Nace's statements in their affidavits. (Vol. I, Apps. I and K.) The Texas Supreme Court nevertheless chose to refer Mr. Nace – and not Ms. Hamilton – to the Grievance Committee.[13]

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[12] Civil contempt proceedings "colored by First Amendment overtones," are appealable for purposes of Supreme Court review. *In re Roche*, 448 U.S. 1310, 1316 n.3 (citing *New York Times Co. v. Jascalevich*, 439 U.S. 1317, 1318-19 (1978)).

[13] Interestingly, and during its campaign season, the largely Republican court referred two democrats, Messrs. Hilliard and Nace, and absolved Ms. Hamilton, the lone Republican, the undersigned attorney. Mr. Nace has contended strenuously that Ms. Hamilton's affidavit swayed the court because, in it, she attested to being a Republican and a supporter of the court. (Vol. II, App. P at 296-301.) While the undersigned attorney is appreciative of the court's decision *not* to send her to the

The court referred Messrs. Hilliard and Nace to the Grievance Committee by written order, dated December 11, 1997. December 11, 1997, thus, is the earliest date the petition for certiorari clock could have started.[14] *See Cox v. Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ("The Court has noted that 'considerations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the State.' ") (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. at 124)).

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court has violated Kelly's constitutional rights twice and her counsels' once. As to Kelly, the court violated her due process and equal protection rights by declining to apply its rules of remand to her case as it has to other cases. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) ("The right to appeal would be

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Grievance Committee, if Mr. Nace's contentions are true, she is ashamed to have received the court's favor in this manner.

[14] One Supreme Court Justice, Justice Rose Spector, dissented on the referral order, intimating that the court had declined to address the merits of the Motion for Rehearing because of the criticism of the court contained therein. Accordingly, Kelly filed a second motion for rehearing. (Vol. II, App. R.) The court denied the second motion for rehearing on January 16, 1998. (Vol. II, App. S.) Again, Justice Spector dissented. (*Id.*)

unique among state actions if it could be withdrawn without consideration of applicable due process norms."). The court further violated Kelly's First Amendment and due process rights by punishing her for the language the Motion for Rehearing contained. *See, e.g., Craig v. Harney,* 331 U.S. 367, 376 (1947). As to Kelly's counsel, the court violated their First Amendment and due process rights by publicly shaming them and referring them to the Grievance Committee (by a published order appended to its decision on the merits, *see Merrell Dow Pharmaceuticals, Inc. v. Havner,* 953 S.W.2d 706 (Tex. 1997)). The court did so in response to admittedly non-disruptive language, contained in a brief filed with the court, and in the absence of any due process procedures, such as proper notice and a hearing.

A. The First, Fifth, and Fourteenth Amendments to the United States Constitution Protect a Litigant from Unequal Application of Existing Law and from Judicial Retaliation in Response to Legal Arguments Made By That Litigant's Counsel.

This Court long has held that the discriminatory application of laws against particular individuals is a violation of due process.[15] *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), and *Thornhill v. Alabama,*

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[15] While it is true that there is no constitutional right to an appeal in and of itself, "if a State has created appellate courts as 'an integral part of the . . . system. . . . the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *See Evitts v. Lucey,* 469 U.S. at 393 (quoting *Griffin v. Wainwright,* 372 U.S. 335, 344 (1963)).

310 U.S. 88, 95-96 & nn. (1940) (holding that selective prosecution by way of laws that affect an individual's right to free speech constitutes a denial of substantive due process). In *Papachristou,* this Court observed, "Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.' " 405 U.S. at 162 (quoting *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939)). Further, this Court specifically has held that, "the due process implications are equally applicable to the States." *Papachristou,* 405 U.S. at 165. "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts,* 469 U.S. at 401.

No party has denied – nor could they, as this record makes clear – that Kelly originally tried her case under the laws of Texas as they stood at the time of trial.[16] And she won.

What Kelly disputes is whether a court has the right to (i) change the law under which a litigant properly tried her case (and met all relevant burdens), (ii) reverse the original jury decision in that litigant's favor, and then (iii) deny the litigant a new trial. "Where, as here, there are no standards governing the exercise of discretion . . . , the

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[16] Kelly does not dispute here and has never disputed that a state supreme court has the power to "pull the rug out from under" a litigant and change the law (the value of *stare decisis* being particularly ephemeral in a state with an elected judiciary).

scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local . . . officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170 (quoting *Thornhill*, 310 U.S. 97-98)).

Kelly contested the constitutionality of the court's actions in her Motion for Rehearing and her Response to the Court's Show Cause Order.[17] The Texas Supreme Court declined at every juncture to respond to these issues. Only this Court can order it to do so.

Kelly petitions this Court to reverse the Texas Supreme Court's decision on rehearing, and order it to delineate its treatment of Kelly from its treatment of her attorneys. As it stands, Kelly and her counsel have no way of knowing whether the court retaliated against Kelly for her counsels' conduct. This Court is the only authority to which she now can turn. While Kelly protests

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[17] Kelly adequately has preserved error on the issues raised here. Kelly raised the constitutionality of the Texas Supreme Court's actions in her Motion for Rehearing and the Response to Show Cause Order (and pleadings related thereto). (*See also* Vol. II, App. R at 319-20.) Consequently, prior to the court entering a final order in her case, Kelly fully had raised the issue of the constitutionality of the court's failure to grant her a remand, the court's punishment of her for her counsels' choice of briefing language; further, her counsel had preserved their First Amendment complaints, as well. *See Payton v. New York*, 445 U.S. 573, 583 n.19 (1980), and *Raley v. Ohio*, 360 U.S. 423, 436-37 & n.12 (1959); *see also Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974) (per curiam), and *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 319-20 & n.6 (1971).

here that the Texas Supreme Court acted unconstitutionally when it declined to apply to her the laws of Texas as it has to other litigants, Kelly asks only at this time that this Court abstain at this time (subject to further review at a later date, if necessary) from the underlying question of the propriety of the Texas Supreme Court's decision not to reverse and remand. Kelly makes this request in deference to the Texas Supreme Court, in order that the Texas Supreme Court has an opportunity to explain the legal basis for its decisions in this matter. The alternative is for this Court to order a new trial for Kelly, without giving the Texas Supreme Court an opportunity to explain its conduct. Obviously, the latter course is preferable.

B. The First, Fifth, and Fourteenth Amendments to the United States Constitution Protect a Litigant's Counsel's Right to Make Non-Disruptive Legal Arguments in Filed Papers.

The significance of the First Amendment can be no greater than in the arena of criticism of the judiciary. This Court recognizes that freedom of expression has particular significance with respect to the government because "it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 777 n.11 (1978) (quoting T. Emerson, *Toward a General Theory of the First Amendment* 9 (1966)). In *Bellotti,* speaking further about legislative power, the Court observed:

> Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the

> legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

Id. at 785-86 (footnotes omitted).

The Court spoke in *Bellotti* of (1) legislative power in the context of (2) prior restraints. The situation at issue here is even graver. As to the legislative power distinction, at least a legislature answers to the judicial system on constitutional issues. To whom, if not this Court, does a state supreme court answer when an aggrieved litigant believes that court to have violated the United States Constitution? If a state court is not to answer to this Court under the circumstances here, then a state supreme court has unlimited power to suppress all criticism of itself under the guise of disapproving of the "tenor" of arguments in briefs. The founding fathers would roll over in their graves if they knew that this is how the First Amendment stands today.

As to the prior restraint distinction, at least a prior restraint can be litigated: persons potentially subject to its reach presumably know the law exists. When a state supreme court punishes an attorney for criticizing it in a brief, in the absence of any law or notice (which law or notice, hopefully, would violate the First Amendment, anyway), both the client and the attorney are struck at the knees and deprived of virtually any weapon of defense. Such a result is particularly absurd here, given the Texas Supreme Court's well-documented history of verbal self-flagellation in terms more inflammatory than those used by Kelly's counsel in the Motion for Rehearing. (*See* Vol.

II, App. M at 220-49.) In short, "the concept that government may restrict the speech of some elements of our society [*e.g.*, litigants and their counsel] to enhance the relative voice of others [*e.g.*, a state supreme court] is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The Constitution requires *for these precise reasons* that, prior to penalizing counsel for language counsel employs in court, the language at issue must be "disruptive" of the "administration of justice." *In re Little*, 404 U.S. 553, 555 (1972), and *Craig v. Harney*, 331 U.S. at 376. Criticism, in and of itself, is not disruptive. The vehemence of the language used is not alone the measure of the power to punish for contempt; rather, it is, "the fires which it kindles," which "must constitute an imminent, not merely a likely, threat to the administration of justice." *Craig v. Harney*, 331 U.S. at 376. The requirement of a showing of "disruption" is even more necessary when the language at issue is in a written pleading, as opposed to being an oral statement in open court. *See id.* ("If the point had been made in a petition for rehearing and reduced to lawyer's language, it would be of trifling consequence.").

The record before this Court – *the very same record upon which the Texas Supreme Court predicated its Show Cause Order and referral to the Grievance Committee* – contains absolutely no evidence that Kelly's counsels' conduct was disruptive of or obstructive to the administration of justice. The only evidence is, in fact, to the contrary. As noted above, the Court itself acknowledged, in a published statement by one of the Associate Justices, that Kelly's Motion for Rehearing neither disrupted court proceedings nor

"bruised any feelings." "[T]he court's action had nothing to do with the judges' sensibilities. . . . " and "The motion was filed when most justices were on vacation or educational leave." (Vol. II, App. M, Ex. 3 at 288 [Justice Gonzalez speaking to *Texas Lawyer,* a newspaper].)

Under these circumstances, no court constitutionally could hold that improper conduct occurred. As this Court observed in *In re McConnell,* 370 U.S. 230 (1962):

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted.

Id. at 234 (quoting *Ex parte Hudgings,* 249 U.S. 378, 383 (1919)); *see also, Holt v. Virginia,* 381 U.S. 131, 136 (1965) (addressing "vile, contemptuous, insulting" language used in allegations of bias and need to recuse, and observing, "Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part."). After all, "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney,* 331 U.S. at 376.

The Texas Supreme Court's decision to refer Messrs. Hilliard and Nace drove a wedge between Kelly and her attorneys because, and by way as example only, she no longer knew whether: (1) the Court had denied the

Motion for Rehearing on the merits or as punishment for her counsels' conduct; (2) Mr. Nace could represent her in Texas; (3) her counsel had acted on her behalf and in her interests when they filed the Motion for Rehearing; and (4) she needed different counsel to file a new motion for rehearing on her behalf.

The court's decision also caused harm to Kelly's counsel because it caused her counsel to suffer shame and injury to their reputation. *See Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997) (the Court is "persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset"). Regardless of any subsequent conduct by the Grievance Committee (in other words, regardless of the outcome of any grievance proceedings), the court's show cause order and referral to the Grievance Committee, in and of itself, permanently has harmed Messrs. Hilliard's and Nace's reputations.

CONCLUSION

Kelly and her counsel petition the Court for the following relief. *First*, Kelly asks the Court to reverse the Texas Supreme Court's decisions, and either (1) order it to delineate its treatment of Kelly from its treatment of her attorneys, explaining why it denied her a remand (and instead reversed and rendered) or (2) address the merits of the due process arguments she raises in connection with the 'remand v. reversal' issue.

Second, Kelly's counsel ask the court to reverse and rescind the Texas Supreme Court's order of referral to the

Grievance Committee. As to the First Amendment issues, the Texas Supreme Court has denied counsel all due process. The court's actions have harmed counsels' reputations (and attorney-client relationship with Kelly) beyond doubt. If this Court fails to enforce the Constitution's protections on these matters, counsel's reputation will remain stained.

Respectfully submitted,

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